STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 3, 2000
v	No. 212190 Oakland Circuit Court
GERALD M. ATKINS, Defendant-Appellant.	LC No. 97-155349-FC

Before: Cavanagh, P.J., and Saad and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of first-degree murder, MCL 750.316; MSA 28.548, six counts of assault with intent to commit murder, MCL 750.83; MSA 28.278, three counts of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, two counts of felonious assault, MCL 750.82; MSA 28.277, one count of unlawfully driving away an automobile (UDAA), MCL 750.413; MSA 28.645, and twelve counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to life imprisonment for the murder conviction, six terms of forty to sixty years each for the assault with intent to commit murder convictions, three terms of ten to fifteen years each for the assault with intent to do great bodily harm less than murder convictions, two terms of 4-1/2 to 6 years each for the felonious assault convictions, 5 to 7-1/2 years for the UDAA conviction, all sentences to run concurrently, but consecutive to twelve concurrent two-year terms for the felony-firearm convictions. Defendant appeals as of right. We affirm.

Defendant challenges the trial court's denial of his motion to suppress statements made to Detective William Harvey four days after the charged offenses. Defendant argues that the statements were obtained in violation of his right to counsel under both the Fifth and Sixth Amendments. We disagree.

A trial court's findings of fact at an evidentiary hearing on a motion to suppress are generally reviewed for clear error. *People v Marsack*, 231 Mich App 364, 372; 586 NW2d 234 (1998). A ruling on a motion to suppress is "reviewed under the de novo standard for all mixed questions of fact and law, and for all pure questions of law." *Id.* The application of a constitutional standard by a trial

court will not receive the same deference as its fact findings. *People v Stevens (After Remand)*, 460 Mich 626, 631; 597 NW2d 53 (1999).

In the case at bar, the relevant facts are essentially undisputed. Regardless of whether the issue is analyzed under the Fifth or Sixth Amendment, the crucial question is not who first initiated contact on November 18, 1996, but rather, who initiated the interrogation. See *People v Kowalski*, 230 Mich App 464, 478; 584 NW2d 613 (1998); see also *Michigan v Jackson*, 475 US 625, 636; 106 S Ct 1404; 89 L Ed 2d 631 (1986); *Edwards v Arizona*, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981). Interrogation refers to express questioning or its "functional equivalent," that is, "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 479, quoting *Rhode Island v Innis*, 446 US 291, 301; 100 S Ct 1682; 64 L Ed 2d 297 (1980).

The uncontradicted proofs regarding what was said during Detective Harvey's initial contact with defendant in his jail cell on November 18, 1996, as evidenced by both Detective Harvey's testimony and the transcript of defendant's statements during the subsequent interview, do not, as a matter of law, rise to the level of an interrogation. The conversation about the media attention did not convert the conversation to an interrogation. At best, the evidence established that Detective Harvey refused defendant's attempt to initiate an interrogation in the jail cell, but agreed to do so a short time later, only after defendant informed a deputy that he wanted to speak to Detective Harvey. Accordingly, we hold that Detective Harvey did not violate defendant's right to counsel under either the Fifth or Sixth Amendments, because the interrogation was initiated by defendant.

Defendant argues that the prosecutor's remarks during closing and rebuttal arguments deprived him of a fair trial. We disagree.

Only defendant's claim with respect to the prosecutor's rebuttal argument involving Reid Meloy was preserved with an appropriate objection at trial. At trial, defendant argued that the prosecutor had mischaracterized Meloy's testimony. Although there is no indication in the record that defense counsel requested a curative instructive, we find that the court's subsequent instruction informing the jurors that the lawyer's statements and arguments are not evidence was sufficient to cure any prejudice caused by the prosecutor's remarks. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995); *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). We also find that defendant's newly raised claim on appeal, that the prosecutor's remarks improperly denigrated defense counsel, establishes no basis for relief. Prosecutorial arguments are evaluated in light of defense arguments and their relationship to the evidence. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), lv pending. We note that evidence was presented at trial regarding the circumstances under which Meloy was retained by the defense, and that defendant's own proofs inferred that Meloy was contacted as a last minute effort to find expert testimony supportive of defendant's insanity defense. Indeed, Meloy testified that, "whenever I get a call at the last minute from an attorney, I'm suspect," and made it clear that the scope of his services involved neither a diagnosis of defendant, nor an opinion on his criminal responsibility. Although the prosecutor's speculation in her rebuttal argument as to why defense counsel did not have Meloy evaluate defendant may have been improper, we do not find that it constituted the type of personal attack on defense counsel for which reversal is required. *People v Kennebrew*, 220

Mich App 601, 607; 560 NW2d 354 (1996); *People v Wise*, 134 Mich App 82, 102; 351 NW2d 255 (1984). The remarks did not deny defendant a fair and impartial trial. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998).

Because defendant's remaining claims of prosecutorial misconduct were not preserved with an appropriate objection at trial, defendant must show plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *Schutte*, *supra*. In this context, it is appropriate to consider whether a timely objection and request for a cautionary instruction could have cured any prejudice. *Bahoda*, *supra* at 285; *Stanaway*, *supra* at 687.

After considering each of defendant's claims, both individually and cumulatively, we conclude that defendant has not established any error warranting appellate relief. Defendant has not established that he was deprived of a fair trial. *Bahoda*, *supra* at 292 n 64.

Although the prosecutor's remark that defendant was a supply clerk in the army lacked evidentiary support, the court's instruction that the lawyer's statements and arguments are not evidence was sufficient to dispel any prejudice. *Bahoda*, *supra* at 281.

Viewed in context, the prosecutor's comments about the insanity defense being the only available defense and not being a good defense were not plainly improper, especially considering that the prosecutor subsequently argued the evidence (e.g., that no expert testified that defendant was legally insane) to support her claim that the insanity defense was not a good defense. A prosecutor may comment on the weakness of a defense. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995).

The prosecutor's remark that "[t]here's never been a case with this much premeditation and deliberation," even if error, does not require reversal because it did not affect the outcome of the trial. *Carines*, *supra* at 763. Viewed in context, the prosecutor did not argue for guilt based on her personal knowledge of other cases, but rather, referred to the trial evidence in the case at bar as establishing premeditation and deliberation. Any misleading effect caused by the prosecutor's remark could have been dispelled by a timely objection and request for a cautionary instruction. *Stanaway*, *supra* at 687.

Further, we find that defendant has not shown that the prosecutor plainly engaged in misconduct by commenting on his prior acts. To the contrary, examined in context, it is apparent that the challenged remarks were directed at the issue of defendant's sanity and, in particular, the diagnosis of defendant as having an anti-social personality disorder. "Testimony of prior antisocial conduct, ordinarily completely inadmissible, becomes material and admissible as bearing on the issue of defendant's insanity." *People v Simonds*, 135 Mich App 214, 218-219; 353 NW2d 483 (1984). See also *People v McRunels*, 237 Mich App 168, 183; 603 NW2d 95 (1999). Similarly, the prosecutor's reference to defendant as a "punk" and "coward," even if improper, provide no basis for relief because there is no reasonable likelihood that they affected the outcome of trial. *Carines*, *supra* at 763; cf. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Patrick M. Meter